No. 12524

United States
Court of Appeals
For the Ninth Circuit.

S. V. JUBAS, Doing Business Under the Fictitious Firm Name and Style of WEST COAST JOBBING COMPANY,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate of FASHION BOOTERY, a Copartnership Composed of GENE FAGAN and LEO G. OLSON, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court, Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

GENDEL & RASKOFF,

810 James Oviatt Bldg.,
617 S. Olive St.,
Los Angeles 14, Calif.

For Appellee:

CRAIG, WELLER & LAUGHARN,

817, 111 West 7th St.,
Los Angeles 14, Calif.

In the District Court of the United States, Southern District of California, Central Division

Civil No. 10392-W

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate of FASHION BOOTERY, a Co-partnership Composed of GENE FAGAN and LEO G. OLSON, Bankrupt,

Plaintiff,

vs.

S. V. JUBAS, Doing Business Under the Fictitious Firm Name and Style of WEST COAST JOBBING COMPANY,

Defendant.

COMPLAINT

(Fraudulent Conveyances, Bankruptcy Act, Section 70-E, Civil Code of California, Section 3440)

Plaintiff for his cause of action complains of the defendant and alleges:

I.

That at all times herein mentioned, the bankrupt, Fashion Bootery, was a copartnership composed of Gene Fagan and Leo G. Olson, and was engaged in the sale of shoes at retail in the County of Los Angeles, in the Southern District of California.

II.

That at all times herein mentioned, the defendant S. V. Jubas was a sole trader doing business under

the fictitious firm name and style of West Coast Jobbing Company, at No. 721 South Los [2*] Angeles Street, Los Angeles, California.

III.

That on March 1, 1949, an involuntary petition in bankruptcy was filed in the District Court of the United States, Southern District of California, Central Division, by three creditors of the bankrupt, Fashion Bootery, a copartnership, as aforesaid, praying that it be adjudged a bankrupt within the provisions of Section 4, subdivision b, and Section 5, subdivision a, of the National Bankruptcy Act; that thereafter such proceedings were had that on March 23, 1949, an adjudication in bankruptcy was entered against said bankrupt copartnership by said United States District Court, and at the first meeting of creditors had and held before Honorable Benno M. Brink, Referee in Bankruptcy, before said Court to whom said proceedings had been referred, the plaintiff was elected trustee in bankruptcy, filed his bond and qualified, and at all times since May 5, 1949, has been and now is the duly elected, qualified and acting Trustee in bankruptcy for the bankrupt estate of said Fashion Bootery, a copartnership, as aforesaid.

IV.

That this is an action brought under the provisions of Section 70-e of the National Bankruptcy Act, and Section 3440 of the Civil Code of California

*** Page numbering appearing at bottom of page of original Transcript of Record.**

to set aside and avoid transfers made by the bankrupt in fraud of its creditors, and to recover the value of the property so transferred by said bankrupt for the benefit of the bankrupt estate.

V.

Plaintiff alleges that on or before the 11th day of August, 1948, the bankrupt copartnership was engaged in the business of selling shoes to the public at retail and was a retail merchant; that on August 11, 1948, while so engaged in the business of selling shoes to the public at retail, the bankrupt copartnership sold, transferred and delivered to the defendant a shipment consisting of [3] 1,240 pairs of shoes which had cost the bankrupt copartnership from $5.25 to $8.25 per pair, or a total value of approximately $7800.00, for a sale price of $1.00 per pair; that said 1,240 pairs of shoes constituted a substantial part of the bankrupt copartnership's stock in trade, and that the sale and transfer of said shoes was not accomplished in the usual and ordinary course of the business of the bankrupt, namely, sale of shoes at retail to the public, but was made for the purpose of resale by the said defendant herein.

VI.

That neither the bankrupt nor the defendant herein at least 7 days prior to the consummation of such sale and transfer of said 1,240 pairs of shoes to the defendant, recorded in the office of the County Recorder of the County of Los Angeles, in which

said shoes were situated, a notice of said intended sale or transfer of said shoes, stating the name and address of the intended vendor or transferor, and the name and address of the intended vendee or transferee, and a general statemnt of the character of the merchandise intended to be sold or transferred, and the date when and the place where the purchase price or consideration was to be paid, nor did the bankrupt nor the defendant publish a copy of such notice in a newspaper of general circulation published in the township in which such transfer was intended to be made; that at the time of said transfer of said 1,240 pairs of shoes, the bankrupt copartnership was indebted to numerous and divers creditors whose claims remained unpaid in the bankruptcy proceedings hereinbefore described, and in so far as said creditors are concerned and in so far as the plaintiff herein is concerned, said sale was fraudulent, null and void.

VII.

That the plaintiff is informed that the defendant has sold and disposed of said shoes and that the same cannot be returned. [4]

Wherefore, plaintiff prays judgment against the defendant for the value of said shoes, namely, the sum of $7,800.00, with interest on said sum from May 4, 1949, at the rate of 7% per annum, together with all of the plaintiff's costs and disbursements herein; and that plaintiff be given such other and

further relief as the Court may deem just and equitable in the premises.

CRAIG, WELLER &
LAUGHARN,

By /s/ FRANK C. WELLER,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed Sept. 29, 1949.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and by way of answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

First Defense

I.

Admits the allegations of Paragraphs I, II and III.

II.

Denies generally and specifically each and every allegation contained in Paragraph IV. [7]

III.

By way of answer to Paragraph V, defendant admits that the bankrupt copartnership therein referred to, was engaged in the business of selling

shoes to the public at retail and that defendant on or about August 11, 1948, purchased 1240 pairs of shoes from said bankrupt copartnership for the sum of $1240.00, but except as in this Paragraph otherwise expressly admitted, defendant denies generally and specifically each and every allegation contained in Paragraph V.

IV.

By way of answer to Paragraph VI, this answering defendant admits that no notice of an intended sale was either published or recorded. In answer to the portion of said Paragraph VI beginning at Line 23 of Page 3 of the complaint with the words "that at the time of said transfer. . . .," and ending at the end of said Paragraph VI, defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this portion of Paragraph VI, and for this reason denies generally and specifically each and every allegation therein contained.

Second Defense

I.

That the sale of 1240 pairs of shoes by the aforesaid bankrupt copartnership to the defendant on or about August 11, 1948, was in the ordinary course of trade and in the regular and usual practice and method of business of the said bankrupt copartnership.

Third Defense

I.

That the sale of 1240 pairs of shoes by the aforesaid [8] bankrupt copartnership to the defendant on or about August 11, 1948, did not constitute a substantial part of the stock in trade of the said bankrupt copartnership. In this connection, defendant alleges that said 1240 pairs of shoes purchased by defendant from the said bankrupt copartnership, constituted approximately one-fourth of the stock in trade of the bankrupt at the time of said sale, on the basis of the number of pairs of shoes then owned by the bankrupt, but said 1240 pairs of shoes constituted less than 10% of the then market value of the stock in trade of the bankrupt copartnership at that time.

Fourth Defense

I.

That the provisions of Section 3440 of the Civil Code of the State of California did not apply to the transaction between the bankrupt copartnership and the plaintiff.

Fifth Defense

I.

That defendant is not indebted to plaintiff in any sum whatsoever.

Sixth Defense

I.

The complaint fails to state a claim against the defendant upon which relief can be granted.

Wherefore, defendant prays that the complaint be dismissed; for defendant's costs of suit incurred herein; and for such other and further relief as to the Court may seem proper.

GENDEL & RASKOFF.

By /s/ H. MILES RASKOFF,
Attorneys for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 25, 1949. [9]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The pre-trial conference in the above-entitled cause having regularly come on for hearing before the undersigned on December 9th, 1949, the plaintiff appearing by Thomas S. Tobin, Esq., of Craig, Weller & Laugharn, his attorneys, and the defendant S. V. Jubas appearing by Martin Gendel, Esq., of Gandel & Raskoff, his attorneys, and the said parties through their respective counsel having entered into the following stipulation of facts:

Several years prior to the transaction herein involved, A. Needleman, Gene Fagan and Leo G. Olson were co-partners doing business as Fashion Bootery; at or about January, 1948, the partnership was dissolved by the withdrawal of A. Needleman, and the [11] present bankrupt Fashion Bootery, a copartnership composed of Gene Fagan and Leo G. Olson was formed to carry on its business of selling shoes, particularly women's shoes, at 520 South Hill Street, Los Angeles, California.

At or about August, 1948, the bankrupt decided to sell approximately 1240 pairs of shoes which it had accumulated during its existence and which were rendered obsolete by reason of broken sizes, changes in styles, obsolete novelty styles, and a change from high heel shoes to low heel shoes.

As of the date of the sale involved in the instant case, the bankrupt contends it was solvent.

Prior to August 11, 1948, the only substantial sale of a like character as is involved in the instant case was the sale in a job lot of accumulated rubber rain shoes.

On August 11, 1948, the defendant bought the 1240 pairs of shoes, issuing a check for $1,000 on that date and leaving a balance of $240 to be paid when the shoes were delivered to and checked by the defendant; the balance of $240 was paid by check dated August 17, 1948. The $1240 was used by the bankrupt in the ordinary course of business.

No notice of intention to sell was recorded, filed or published by the bankrupt, or the defendant, in

connection with the above-described sale. There was immediate delivery of the pairs of shoes by the plaintiff to the defendant and an actual and continued change of possession.

The defendant offers, in support of his position, the testimony of the two partners of the partnership, and numerous retail and wholesale shoe merchants in the City of Los Angeles, including the following:

Ira L. Brown of Dr. A. Reed Arch Shoe Company;
Mike Kaplan of the C. H. Baker Corporation;
P. M. Siegel of Innes Shoe Company; [12]
A. Scharlin of Solnit Shoe Company;
Jack Orlikoff of Pacific Coast Shoe Company;
Ben S. Rappaport;
R. Laskey of Brasley-Cole Shoe Company;
Oscar Maier of Foster's Shoe Stores, Inc.;
Mark Warner of College Boot Shop.

The plaintiff concedes that the witnesses named by the defendant all would be produced to testify as to custom; if produced, would testify, if permitted, that frequently retail merchants of shoes disposed of surplus or obsolete and shop-worn stock in the manner that these 1240 pairs of shoes were disposed of.

In connection with the witnesses herein named, original statements from each of the same have been designated as Defendant's Exhibit "A" for identification and deposited with the Court, photostatic copies thereof having been furnished to the coun-

sel for the plaintiff; it was further stipulated that if the said evidence is deemed material, that then the Court shall consider the contents of the said defendant's Exhibit "A," for identification, as if the persons signing the said statements had testified under oath as witnesses in the court proceedings.

Subject to plaintiff's objection as to the materiality of such evidence, it was stipulated that prior to the sale to defendant, the bankrupt had made all available attempts to sell said shoes in the ordinary retail method of separate pairs of shoes to individual customers and had been unsuccessful, and the bankrupt had been unable to obtain any higher or better offer than the sum of $1.00 per pair offered by the defendant herein.

It was further stipulated that the issues of fact to be determined by the Court are as follows:

1. Are there still unpaid creditors who have filed proofs of claims in the bankruptcy proceedings involved who were unpaid creditors between August 11, 1948, and August 17, 1948? [13]

2. What was the value of the 1240 pairs of shoes on August 11, 1948?

3. What were the total number of pairs of shoes owned by the bankrupt on August 11, 1948?

4. What profit, if any, did the defendant make upon the re-sale of the 1240 pairs of shoes?

5. Was there, on or about August 11, 1948, a custom and usage in the retail shoe business whereby retail shoe merchants disposed of surplus, obsolete

and shop-worn stock of the character involved in the instant case by job lot sales, without compliance with Section 3440 of the Civil Code?

(a) If this custom and usage is found to have existed, was it a part of the regular and usual practice and method of business of the bankrupt herein?

6. Did the sale of the 1240 pairs of shoes constitute the sale of a substantial part of the stock in trade of the bankrupt?

7. It was further stipulated that the legal question to be determined by the Court, upon the basis of the facts as stipulated hereinabove and the facts to be found, is whether or not the sale to the defendant was excepted from the application of Section 3440 of the California Civil Code; if found excepted, this would terminate the case in favor of the defendant; if found in favor of the plaintiff, then the remaining legal issue would be to determine the amount of damages.

Each of the parties hereto having submitted memoranda of points and authorities in support of their position and statements of facts, and after hearing the arguments of counsel, and accepting the above stipulations, and being fully informed in the premises, and good cause appearing therefore, [14]

It Is Hereby Ordered:

I.

That the above stipulation of facts is accepted and

approved and said facts shall be deemed established in this case, and the Court hereby finds said facts to be true; there shall be no issue with respect thereto at the trial of this action.

II.

The issues for trial shall be limited to the questions of fact left at issue, as recited hereinabove, and to the determination of the issues of law as described hereinabove, particularly with reference to the application of Section 3440 of the California Civil Code.

Dated this 12th day of December, 1949.

/s/ JAMES M. CARTER,
United States District Judge.

Approved:

CRAIG, WELLER & LAUGHARN,

By /s/ THOMAS S. TOBIN,
Attorneys for Paul W. Sampsell, as Trustee, Plaintiff.

GENDEL & RASKOFF,

By /s/ MARTIN GENDEL,
Attorneys for Defendant, S. V. Jubas.

[Endorsed]: Filed Dec. 13, 1949. [15]

DEFENDANT'S EXHIBIT "A"

[Letterhead]

Innes Shoe Co.
Seventh Street at Olive, Los Angeles 14

October 11, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Building
617 South Olive Street
Los Angeles 14, California

Dear Sir:

We understand you are representing Mr. S. V. Jubas doing business as the West Coast Jobbing Company in a certain litigation and are interested in the method that is used by us as retailers in the shoe business.

We have been in business almost fifty years and have found it absolutely necessary at the end of each season to dispose of all merchandise we don't want to carry over to next season because they more or less become obsolete. We think it is good business to do so. I have always believed the first loss is the sweetest.

If you would like to know how we have disposed of our shoes—we as a rule sell them to someone out of town who probably is in the cancellation business; as an example, we sell all of our shoes to Irving Snide in Oakland. We sell them to him once or twice a year, he pays for them, he sells them, and it is a very happy deal for all concerned.

Defendant's Exhibit "A"—(Continued)

When we make a sale such as the above we don't go through any escrow or any written notices to creditors. We do it as part of the routine business and we find this the best method. Otherwise our stocks would keep mounting and mounting and we would accumulate a lot of frozen assets.

We hope the above information will enlighten you as to [16] the method we have of disposing of our short and broken lines and should you need any further information we shall be glad to furnish same.

Very truly yours,

INNES SHOE CO.,
/s/ P. M. SEIGEL.

S/T. [17]

[Letterhead]
College Boot Shop
516 So. Hill St.
Los Angeles, Calif.

Oct. 18, 1949.

H. Miles Raskoff, Esq.,
Kendel & Raskoff,
810 James Oviatt Bldg.,
617 So. Olive St.,
Los Angeles 14, Calif.

Dear Sir:

We understand you are legal attorneys for Mr. S. V. Jubas doing business as the West Coast Jobbing Co.

Defendant's Exhibit "A"—(Continued)

I understand you are interested in the method used by us as retailers in the shoe business.

I have been in the retail shoe business for approximately fifteen years. At the end of each season, spring and fall, after retailing our shoes to the public, there is always left over a considerable number of pairs of odds and ends. It has always been my method to call in a job lot buyer and dispose of these shoes at the best price obtainable. This method has been used by me particularly for women's novelty footwear because of the rapid change in styles. I have found that by calling in a job lot buyer I can always dispose of my unseasonable merchandise so that I do not accumulate a stock of odds and ends which makes my merchandising problem an almost impossible one. I know that practically all shoe retailers, and especially retailers of women's novelty footwear follow the method that I have outlined above.

The above-described sales of job lots, etc., are made without any escrow and without any notice to creditors.

I hope the information that I have furnished you will enlighten you as to the way I dispose of broken lines of shoes.

Should you need any additional information, I will be glad to furnish same.

Yours very truly,

COLLEGE BOOT SHOP,

/s/ MARK WARNER. [18]

Defendant's Exhibit "A"—(Continued)

[Letterhead]
Foster's Shoe Stores, Inc.
440-442 So. Broadway, Los Angeles 13, Calif.

Oct. 18, 1949.

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 S. Olive St.,
Los Angeles 14, Calif.

Dear Sir:

Please be advised that in the early part of August, 1948, I was called in by one of the proprietors of the Fashion Bootery regarding a close out of ladies' shoes. I cannot recall at this time the exact amount of shoes, but I believe it was somewhere in the neighborhood of 1,000 to 1,200 pairs and the price they asked for the lot was $1.25 per pair. I turned them down at this price as I did not think they were worth it.

I believe I had recommended to either Mr. Fagen or Mr. Olsen of the Fashion Bootery that they contact Mr. Si Jubas of the West Coast Jobbing Co., regarding purchasing this lot of shoes and subsequently the sale was made to Mr. Jubas.

Yours very truly,
FOSTER'S SHOE STORES,
INC.,
/s/ OSCAR MAIER,
Pres.

OM-b. [19]

Defendant's Exhibit "A"—(Continued)

[Letterhead]

Foster's Shoe Stores, Inc.
440-442 So. Broadway, Los Angeles 13, Calif.

Oct. 17, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 So. Olive St.,
Los Angeles 14, Calif.

Dear sir:

We understand that you are representing Mr. S. V. Jubas, doing business as the West Coast Jobbing Co., in a certain litigation and are interested in the method we use in disposing of our short and broken lines and discontinued styles at the end of the Seasons.

For your information we have been in the shoe business in Kansas City for approximately 25 years and in Los Angeles 5 years and we have found that it is absolutely necessary at the end of the Summer and Fall seasons to run retail sales to try to dispose of the discontinued styles and short and broken lots of shoes that we do not intend to replenish. We would reduce our prices anywhere from 33 and ⅓% to 50%. After the sale, the balance then remaining, we would call in the job lot buyers and get the very best price we possibly could for these odds and ends. The quantity sold to the job lot buyers would vary according to what would be left

Defendant's Exhibit "A"—(Continued)

over at the end of the seasons. If we had a bad season, we would have a larger quantity of shoes to close out and if we had a good season, we would have a smaller quantity to close out. Nevertheless, there always would be shoes to close out and the reason is obvious, because styles continuously change, and changing as rapidly as they do, if we did not use this method we would have a tremendous accumulation of shoes that would be absolutely worthless. Whenever we did dispose of the shoes as described above, we did not go thru Escrow nor did we deem it necessary to notify our creditors to this effect.

It is a known fact in the retail shoe business that there is not a store in the country who does not have any close-outs. Some stores may want to hold on to their shoes a little longer while others will close out immediately after the seasonal sales are over.

Trusting the above information will enlighten you as to the method we use in disposing of our close-outs,

Yours very truly,

FOSTER'S SHOE STORES, INC.

/s/ OSCAR MAIER,
President. [20]

Defendant's Exhibit "A"—(Continued)

[Letterhead]

Brasley-Cole Shoe Co., Ltd.
1114-1118 South Los Angeles Street
Los Angeles 15, California

October 13, 1949

Mr. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 So. Olive St.,
Los Angeles 14, California.

Gentlemen:

We have been informed that you represent Mr. S. V. Jubas, doing business as West Coast Jobbing Company, in some type of litigation and are interested in receiving an opinion as to general business practice in disposing of odd lot shoes in our particular industry.

It has been and still is the practice in the retail shoe industry to dispose of broken and odd lots, especially so in the high styled field at the close of each season or any particular fiscal period at greatly reduced prices, to job lot buyers or anyone else interested in buying odds and ends at almost ridiculously low prices. These broken lot sales, to the writer's knowledge, are made without any escrow agreements and without written notice to creditors. The writer has been in the shoe business in all its ramifications for upwards of 30 years and this has

Defendant's Exhibit "A"—(Continued)

been the accepted practice of good merchandising not only with retail independents, or chain operations, but also with manufacturers.

If we can be of any service in explaining further, please do not hesitate to communicate with us.

Very truly yours,

BRASLEY-COLE SHOE CO., LTD.

By /s/ R. LASKY,
General Manager.

L:s [21]

[Letterhead]

Ben S. Rapport
212 East Ninth Street, Los Angeles 15, Calif.

October 12, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
617 So. Olive St. (810 James Oviatt Bldg.)
Los Angeles 14, Calif.

Dear Sir:

We understand that you are representing Mr. S. V. Jubas, doing business as the West Coast Jobbing Company, in a certain litigation and are interested in knowing something about the method used by retailers in disposing of their surplus and odds and ends.

Defendant's Exhibit "A"—(Continued)

The writer has been in the shoe business for a period of 28 years, having been a department store buyer for 22 years of that time and it has always been customary and still is for that matter to run seasonable sales on merchandise directed for disposal at reduced prices and when this sale is over the shoes are grouped together with additional mark-downs kept to a minimum and sold off to jobbers in the trade who will give the nearest price without additional loss to the last mark-down taken, of course considering that no selling cost is attached. This is the universal and accepted method used by retailers in disposing of broken lines and odds and ends especially women's novelty shoes so that room can be made for the new season's goods that are about to arrive and need the space in the wall.

Unless a method like this were practiced you can understand how retailers, from the nature of the shoe business involving the pairage of sizes would readily become cluttered up with a stock that would be obsolete and hamper the successful operation on style shoes.

This same procedure is used by wholesalers and manufacturers who carry stock shoes and must dispose of seasonable merchandise at the end of each season.

Most department stores today demand that their buyers dispose of any and all merchandise which has become one year old and that goes not only for novelty but for staple lines.

Defendant's Exhibit "A"—(Continued)

Trust that the above information will be of some assistance to you in the case confronting you, I am,

Yours very truly,

/s/ BEN S. RAPPORT.

BSR:ML [22]

[Letterhead]

Pacific Coast Shoe Co.
768-70 So. Los Angeles Street, Los Angeles 14, Calif.

October 12, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 S. Olive Street,
Los Angeles 14, Calif.

Dear Sir:

We understand that you are representing Mr. S. V. Jubas, doing business as the West Coast Jobbing Company, in a certain litigation, and are interested in the method that is used by us as wholesalers in the shoe business.

It has always been the practice of retailers, large or small, to close out job lots in shoes if they are out of sizes in particular runs, slow moving, or out of season due to colors, sizes or types. One of the main reasons why the retailer, after he has run his retail sales, wants to dispose of the above-described shoes, is because in fashion and novelty shoes the

Defendant's Exhibit "A"—(Continued)

styles change so rapidly and become obsolete very quickly. Therefore, the retailer must dispose of these types of shoes as quickly as possible.

It has been my experience, both in the wholesale and retail, buying of job lots are made without any escrow and without any written notice to creditors, as this is done in the usual course of business.

Trusting this information will enlighten you as to the method that the retailers have in disposing of short and broken lines of shoes.

Very truly yours,

PACIFIC COAST SHOE COMPANY,

/s/ JACK ORLIKOFF.

JO/sbl [23]

[Letterhead]

Solnit Shoe Co.
817-821 S. Los Angeles Street
Los Angeles 14, California

October 12, 1949

Mr. H. Miles Raskoff,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 So. Olive St.,
Los Angeles 14, Calif.

Dear Mr. Raskoff:

We understand that you are representing Mr. S. V. Jubas, doing business as the West Coast Job-

Defendant's Exhibit "A"—(Continued)

bing Company, in a certain litigation and are interested in the method that is used by us in the shoe business.

Regarding the matter of purchasing close-outs from retail stores, after having observed the practices of retailers during the past 25 years, outside of the disposal of complete departments, I have no recollection that retailers ever publish notices of intention to sell only portions of their stocks. Notice of intention to sell is used when stores are sold to new owners.

I know that retailers continuosly clean out their stocks to stock buyers and other retailers when they find that they are over-stocked or that certain shoes are not moving, whether a few pairs are involved or whether large lots are involved.

Sincerly yours,

/s/ A. SCHARLIN.

AS:DA [24]

Defendant's Exhibit "A"—(Continued)

[Letterhead]

Dr. A. Reed Arch Shoe Company
622-624 So. Hill Street
Los Angeles 14, California

October 11, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 So. Olive Street,
Los Angeles 14, Calif.

Dear Sir:

We understand that you are representing Mr. S. V. Jubas, doing business as the West Coast Jobing Co., in a certain litigation and are interested in the method that is used by us as retailers in the shoe business.

We have been in this business for 34 years and have found that after the season is over, we run a retail sale and dispose of as much of the shoes as we can and in order to dispose of the balance still remaining in order to make room for the new season's merchandise coming in, we call in the job lot buyers and dispose of it to them at the best price we can obtain for the close outs and broken lots.

This procedure has been practiced by us for many years and we have found it to be the best method to clean out our stock, particularly ladies' novelty

Defendant's Exhibit "A"—(Continued)

shoes and ladies' shoes in general. We stress the point of the novelty shoes for the reason that they change in style more so than the arch type shoes. Had we not followed the above practice in disposing of our odds and ends and broken and unseasonable shoes, in a few years, our stock would become obsolete and would hamper our successful method in merchandising of our high style shoes. We know it to be a fact that all successful shoe retailers follow the above procedure.

The above-described sales of job lots, etc., are made without any escrow and without any written notice to creditors.

We hope the above information will enlighten you as to the method we have in disposing of our short and broken lines and should you need any further information, we shall be glad to furnish same.

Yours very truly,

/s/ IRA L. BROWN. [25]

Defendant's Exhibit "A"—(Continued)

[Letterhead]

The C. H. Baker Corporation
730 South Los Angeles Street, Los Angeles 14

October 11, 1949

H. Miles Raskoff, Esq.,
Gendel & Raskoff,
810 James Oviatt Bldg.,
617 South Olive Street,
Los Angeles 14, Calif.

Dear Sir:

We understand you are representing Mr. S. V. Jubas, doing business as the West Coast Jobbing Co., in a certain litigation and are interested in the method that is used by us as retailers in the shoe business.

We have been in the retail shoe business for 50 years. When each season is over, we have a sale and dispose of distress and broken lines of shoes. At the end of the sale, in order to dispose of the balance and make room for new season's merchandise, it has been our practice to call in various job lot buyers and dispose of the residue at the best price obtainable.

This procedure has been in practice by us for many years and we have found it to be the best method of cleaning our stock, particularly novelty shoes. We stress the point of novelty shoes because with the rapid changes that occur in styling

Defendant's Exhibit "A"—(Continued)

and colors, it is necessary to dispose of these odds and ends in as short a time as possible. In the event that this disposition was not made, our stocks would soon become burdened down with obsolete merchandise and would be a great hinderance to successful merchandising.

We are certain that the above procedure of handling odds and ends, obsolete styles and broken lines is a common practice among the best shoe retail operations in America.

Very truly yours,

THE C. H. BAKER CORPORATION,

/s/ MIKE KAPLAN.

MK:mcg [26]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action coming on for trial December 14, 1949, at 10 a.m., and the plaintiff appearing by his attorneys, Messrs. Craig, Weller & Laugharn and Thomas S. Tobin of counsel, and the defendant appearing in person and by Martin Gendel, Esq., of Gendel & Raskoff, his attorneys, and the matter having been continued from time to time until December 21, 1949, at 10:30 a.m. with

the same appearances, and testimony having been taken and evidence having been received and with stipulations having been entered into by counsel for the plaintiff and defendant at the pre-trial conference hereafter held, and said matter having been concluded and submitted and the Court having announced his decision in favor [27] of the plaintiff, now makes and enters the following Findings of Fact:

I.

Several years prior to the transaction herein involved, A. Needleman, Gene Fagan and Leo G. Olson were copartners doing business as Fashion Bootery; at or about January, 1948, the partnership was dissolved by the withdrawal of A. Needleman, and the present bankrupt Fashion Bootery, a copartnership composed of Gene Fagan and Leo G. Olson was formed to carry on its business of selling shoes at retail, particularly women's shoes, at 520 South Hill Street, Los Angeles, California. On or before August 11, 1948, the bankrupt copartnership was engaged in the business of selling shoes to the public at retail, and was a retail merchant.

II.

The defendant S. V. Jubas was, at all times herein mentioned, a sole trader doing business under the fictitious firm name and style of West Coast Jobbing Company, at 721 South Los Angeles Street, Los Angeles, California.

III.

On March 1, 1949, an involuntary petition in bankruptcy was filed in the District Court of the United States Southern District of California, Central Division, by creditors of the Bankrupt, Fashion Bootery, a copartnership, praying that it be adjudicated a bankrupt within the provisions of Section 4, Subdivision B, and Section 5, Subdivision A, of the National Bankruptcy Act; that on March 23, 1949, an Order of Adjudication was entered against the bankrupt copartnership by the United States District Court for the Southern District of California, and that at the first meeting of creditors, held before Referee Benno M. Brink, to whom the proceedings had been referred, plaintiff herein was elected Trustee in Bankruptcy, filed his bond, and qualified, and at all times since May 5, 1949, has been, and now is, duly elected, qualified, and [28] acting Trustee in Bankruptcy for the bankrupt estate of Fashion Bootery, a copartnership.

IV.

At or about August, 1948, while so engaged in the business of selling shoes to the public at retail, the bankrupt decided to sell approximately 1240 pairs of shoes which it had accumulated during its existence and which were rendered obsolete by reason of broken sizes, changes in styles, obsolete novelty styles, and a change from high heel shoes to low heel shoes; the said 1240 pairs of shoes had originally cost the bankrupt copartnership from $5.25 to $8.25 per pair. Prior to that date the

bankrupt had made all available attempts to sell said shoes in the ordinary retail method of separate pairs of shoes to individual customers, and had been unsuccessful. The bankrupt had been unable to obtain any higher or better offer for said shoes than $1 per pair, which was offered by the defendant herein.

V.

On August 11, 1948, the bankrupt was solvent, and on said date the defendant bought the aforementioned 1240 pairs of shoes from the bankrupt, issuing a check for $1000 on that date, and leaving a balance of $240 to be paid when the shoes were delivered to and checked by the defendant. The said shoes were delivered to and checked by the defendant, who paid the balance of $240 to the bankrupt on August 17, 1948. The said sum of $1240 paid by the defendant to the bankrupt was used by the bankrupt in the ordinary course of the business of the bankrupt.

VI.

No notice of intention to sell was recorded, filed or published by the bankrupt, or the defendant, in connection with the above-described sale. There was immediate delivery of the said 1240 pairs of shoes by the bankrupt to the defendant, and thereafter was an actual and continuous change of possession. [29]

VII.

The Court finds that a custom had arisen and been followed in Los Angeles County, California,

whereby retailers or shoes ignoring Section 3440 of the Civil Code of California the bulk sales law, made it a practice to sell surplus and obsolete merchandise to jobbers without recording any notice in the office of the County Recorder of the State of California or publishing said notice as required under the bulk sales law, and that this custom of ignoring the provisions of Section 3440 was followed in this instance by the bankrupt and the defendant herein, without any dishonest intent on their part.

VIII.

The aforementioned 1240 pairs of shoes sold by the bankrupt to the defendant, constituted at the time of the sale 25% of the number of pairs of shoes then held as the stock in trade of the bankrupt and 15% of the value of the then stock in trade of the bankrupt.

IX.

The parties to said transaction, namely, bankrupt and defendant, could have, without difficulty, recorded and published the required notice under Section 3440 of the Civil Code of the State of California.

X.

At the time of said sale and transfer of said 1240 pairs of shoes, the bankrupt copartnership was indebted to at least two creditors whose claims have not been paid, and who are creditors in the bankruptcy proceedings of the bankrupt copartnership, namely, Elsie Bleich, a creditor in the sum of $2,200, and Elmer Sikorski, a creditor in the sum of $250.

Based upon the foregoing findings of fact, the Court makes the following Conclusions of Law: [30]

I.

The Court has jurisdiction of the subject matter of this action and of the persons of the plaintiff and defendant under the provisions of Section 70-E of the National Bankruptcy Act, to void said transfer and to render judgment against the transferee, defendant herein, for the value of the merchandise so transferred.

II.

The 1240 pairs of shoes sold by the bankrupt copartnership to the defendant constituted a substantial part of the bankrupt copartnership's stock in trade, both from the viewpoint of quantity and the value of said stock in trade at the time of said sale.

III.

By reason of the failure to record and publish a notice of intended sale, notwithstanding the custom originated and followed by the shoe retailers not to so record and publish, the said sale was and is null and void as to existing creditors of the bankrupt at the time of the transfer, and as to the bankrupt's trustee in bankruptcy, under Section 3440 of the Civil Code of the State of California, and Section 70-E of the National Bankruptcy Act.

IV.

Nothwithstanding the fact other retailers and jobbers may have violated the provisions of Section

3440 in the past, such custom merely shows a custom to ignore the plain provisions of the law of the State of California, and does not constitute the ordinary course of trade or the usual course of business such as was engaged in by the bankrupt.

V.

Plaintiff is entitled to judgment against defendant for the value of said shoes, which value the Court fixes in the sum of $1 per pair, or $1240.00.

Let judgment be entered accordingly, without interest, to date of entry of judgment, with costs, to the plaintiff.

Dated this 10th day of Feb., 1950.

/s/ JAMES M. CARTER,
U. S. District Judge.

Approved as to Form Under Local District Rule.

GENDEL & RASKOFF,

By /s/ MARTIN GENDEL,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 10, 1950. [32]

In the District Court of the United States, Southern District of California, Central Division

Civil No. 10392-C

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate of FASHION BOOTERY, a Copartnership Composed of GENE FAGAN and LEO G. OLSON, Bankrupt,

Plaintiff,

vs.

S. V. JUBAS, Doing Business Under the Fictitious Firm Name and Style of WEST COAST JOBBING COMPANY,

Defendant.

JUDGMENT AND DECREE FOR PLAINTIFF

The above-entitled matter finally coming on for hearing on December 21, 1949, at 10:30 a.m., plaintiff appearing by his attorneys, Messrs. Craig, Weller & Laugharn and Thomas S. Tobin, and defendant appearing in person and by his attorney, Martin Gendel, and testimony having been taken and the Court having made findings of fact and conclusions of law and ordered judgment in favor of plaintiff, now on motion of Messrs. Craig, Weller & Laugharn and Thomas S. Tobin of counsel, it is.

Ordered, Adjudged and Decreed that the plaintiff have and recover judgment against the defendant in the sum of $1240, without [33] interest, to the date of entry of this judgment and with costs in favor of the plaintiff.

Done at Los Angeles Southern District of California this 10th day of Feb., 1950.

/s/ JAMES M. CARTER,
U. S. District Judge.

Approved as to Form Under Local District Rule.

GENDEL & RASKOFF,

/s/ MARTIN GENDEL,
Attorneys for Defendants.

[Endorsed]: Filed and entered Feb. 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the Above-Entitled Court:

Notice Is Hereby Given that S. V. Jubas, defendant above named, hereby appeals to the United States Court of Appeals for the 9th Circuit, from the final judgment entered in this Court on February 10, 1950, in Judgment Book No. 63 at Page 729, and from the whole thereof.

Dated this 6th day of March, 1950.

GENDEL & RASKOFF,

By /s/ H. MILES RASKOFF,
Attorneys for Defendant-Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 10, 1950. [35]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

To: The Clerk of the Above-Entitled Court:

S. V. Jubas, defendant above named, through his counsel, hereby designates the entire record before the District Court, including all the papers, pleadings, evidence and exhibits filed with the District Court.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedures for the United States District Courts, and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the 9th Circuit, as amended, request is hereby made that the Clerk of the above-entitled Court transmit all the [37] original papers in the file dealing with the action or the proceedings in which the appeal has been taken, including the Notice of Appeal and this Designation.

Dated: This 6th day of March, 1950.

GENDEL & RASKOFF,

By /s/ H. MILES RASKOFF,
Attorneys for Defendant-Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 10, 1950. [38]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 39, inclusive, contain the original Complaint; Answer; Pre-Trial Order; Defendant's Exhibit A; Findings of Fact and Conclusions of Law; Judgment and Decree; Notice of Appeal and Designation of Record on Appeal which, together with original reporter's transcript of proceedings on December 21, 1949, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 14th day of April, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

In the United States District Court, Southern District of California, Central Division

No. 10392-C Civil

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate of FASHION BOOTERY, a Copartnership Composed of GENE FAGAN and LEO G. OLSON, Bankrupt,

Plaintiff,

vs.

S. V. JUBAS, Doing Business Under the Fictitious Firm Name and Style of WEST COAST JOBBING COMPANY,

Defendant.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Wednesday, December 21, 1949

Appearances:

For the Plaintiff:

CRAIG, WELLER & LAUGHARN,

by THOMAS S. TOBIN, ESQ.,

111 West 7th Street,
Los Angeles, California.

For the Defendant:

GENDEL & RASKOFF,

by MARTIN GENDEL, ESQ.,

617 South Olive Street,
Los Angeles, California.

The Court: Call the next case.

The Clerk: No. 10392-C Civil, Paul W. Sampsell v. S. V. Jubas, for trial.

Mr. Gendel: Ready for defendant.

Mr. Tobin: Ready for plaintiff.

GENE FAGAN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Gene Fagan.

Direct Examination

By Mr. Tobin:

Q. Where do you live, Mr. Fagan?

A. 3666 Glenfeliz Boulevard.

Q. You are one of the bankrupts in the matter of the Fashion Bootery, Bankrupt? A. Yes.

Q. A copartnership consisting of you and Leo Olson? A. Yes.

Q. What kind of business were you in?

A. Retail shoe store.

(Testimony of Gene Fagan.)

Q. Located where? [2*]

A. 520 South Hill.

Q. And you were selling shoes to the public?

A. Yes.

Q. By the individual pair?

A. Individual pairs.

Q. At retail? A. At retail.

Q. You were not in the wholesale business?

A. No, sir.

Q. On August 11, 1948, you sold 1240 pairs of shoes to one customer, did you?

A. Sold 1240 pairs of shoes to a jobber.

Q. Sy Jubas? A. Sy Jubas.

Q. What had you paid for those shoes?

A. They ranged from—anywhere from five and a quarter, five seventy-five, to eight fifty, consisting of stock in that price category.

Q. Per pair? A. Per pair.

Q. About how many pairs of shoes did you have in your stock at that time?

A. We had over 4,000 pair.

The Court: Counting the 1240?

The Witness: Well, I had rubber goods and stuff like [3] that that I didn't count.

The Court: The 12,000, does that include the 1240, or after you had sold the 1240?

Mr. Tobin: Your Honor said "12,000." It was 4,000.

The Witness: Close to 5,000 pair, 4,000, 5,000 pair, I wouldn't know exactly.

*** Page numbering appearing at top of page of original Reporter's Transcript.**

(Testimony of Gene Fagan.)

The Court: Do you count the 1240 or do you except the 1240?

The Witness: We counted the 1240.

Q. (By Mr. Tobin): How much did you sell those shoes to Mr. Jubas for?

A. I sold them for a dollar—I tried to get more—because they were shoes that we had accumulated, you know what I mean, they were odds and ends, we accumulated in stock and had, you know what I mean, that the public wouldn't buy.

Q. Had you put on any clearance sales?

A. Yes, sir.

Q. Prior to that? A. Yes, sir.

Q. But in any event when you sold these 1240 pairs of shoes to Mr. Jubas you did not record a notice of intention at least seven days before this sale to sell this 1240 pairs?

The Court: That has been stipulated to.

The Witness: I didn't know anything about that.

Q. (By Mr. Tobin): And those were shoes out of your [4] retail stock, were they?

A. Well, yes, that we accumulated.

Q. How many customers had you sold 1240 pairs of shoes to prior to that?

Mr. Gendel: Your Honor, I think that is covered by the stipulation.

The Court: I think it is stipulated that he never previously sold that many shoes. The only other previous occasion when he sold any bulk amount

(Testimony of Gene Fagan.)

of goods was an occasion when he sold a bunch of rubber, some 200 pairs, something like that.

Is that about right?

Mr. Tobin: Yes, your Honor.

The Court: That is in the stipulation.

Mr. Tobin: That is all. Just a minute.

Q. (By Mr. Tobin): At the time that you sold these shoes to Mr. Jubas were you indebted to any creditors who were creditors in your bankruptcy proceeding? A. Yes, I was.

Q. Directing your attention to Elsie Bleich, there is a claim on file in the bankruptcy proceeding based on a promissory note signed by your partner and yourself of some $2200?

A. That's right.

Q. Was that owing at that time? [5]

A. Yes, sir.

Q. And it has never been paid?

A. That's right.

Q. And the claim is in the bankruptcy proceeding? A. I believe so.

Q. Were you also indebted to a man by the name of Elmer Sikorsky at that time? A. Yes, sir.

Q. In the sum of $250? A. That's right.

Q. And has that ever been paid?

A. No, sir.

Mr. Tobin: That is all.

(Testimony of Gene Fagan.)

Cross-Examination

By Mr. Gendel:

Q. Mr. Fagan, with reference to the Elsie Bleich amount of $2200, was that a loan to the partnership, or was it a loan to individuals?

A. Well, I guess they loaned it to us, to the——

Q. Do you understand the distinction between the partnership and yourself individually?

A. Well, I think that they loaned it—in fact, her son-in-law was working for us, that is how we secured the money. [6]

Q. Was that a loan made prior to January of 1948? A. Yes, sir.

Q. That was while Abe Nedelman was still in the business? A. That's right.

Q. Did Nedelman sign the note, too?

A. Yes, sir.

Q. It was Nedelman, Olson, and yourself that signed the note, is that right?

A. That's right.

Q. What was this Sikorsky loan?

A. Well, that was made in '47.

Q. To whom was that loan made?

A. It was made to us, Abe Nedelman and myself.

Q. In the preceding business, is that right?

A. Yes.

Q. This business was organized in January, '48, when Abe Nedelman took over the San Pedro store by himself, is that right? A. Yes.

(Testimony of Gene Fagan.)

The Court: What is the significance of that, counsel? What difference would it make whether these loans were incurred at the time Nedelman was a partner, before his withdrawal?

Mr. Gendel: I wanted to satisfy myself, Judge Carter, [7] that these were partnership loans. I am satisfied that these are partnership creditors. From Mr. Fagan's testimony that appears to be obvious.

Q. (By Mr. Gendel): Mr. Fagan, how long have you been in the shoe business?

A. I have been in it around 35, 36 years, longer.

Q. Has a good part of that experience been in the County of Los Angeles?

A. Quite a bit of it.

Q. All right. Are you familiar with the method and practice used by retail shoe stores in the Los Angeles community in disposing of these obsolete and accumulated odds and ends of shoes?

Mr. Tobin: That would be objected to as irrelevant, incompetent, and immaterial, not tending to excuse compliance with the bulk sales law.

The Court: I have your point in mind and I have thought about it. In one sense, actually, what counsel is going to try to do is to prove a practice to violate the law.

I am going to overrule the objection and let the witness answer and see what the evidence shows.

Mr. Tobin: May all that testimony go in subject to the objection?

(Testimony of Gene Fagan.)

The Court: Your objection may go to the entire line of testimony. [8]

Q. (By Mr. Gendel): Would you answer the question, please?

A. In this interruption my thoughts wandered.

The Court: Read the question.

(The question referred to was read by the reporter as follows: "All right. Are you familiar with the method and practice used by retail shoe stores in the Los Angeles community in disposing of these obsolete and accumulated odds and ends of shoes?")

The Witness: To the best of my knowledge I can answer some of it. They accumulate, any department store or shoe store accumulates odds and ends, it doesn't have to be in season or out of season, and they sell those to jobbers or even small stores like myself.

Q. (By Mr. Gendel): Then you are familiar with that method and that practice of disposing of these obsolete shoes, is that right?

A. I believe so.

Q. In connection with such sale, do you know whether or not that method and practice includes the filing of a notice of intention to sell under Section 3440 of the Civil Code?

Mr. Tobin: The same objection.

The Court: Same ruling.

A. That I don't know. [9]

Q. (By Mr. Gendel): Well, to your knowledge

(Testimony of Gene Fagan.)

of the method and practice did it include the requirement that there be any notice under 3440?

A. No, sir.

Q. You had never done it? A. No.

Q. And you never heard of it ever being done, had you? A. No, sir.

Q. You have been in the shoe business how long?

A. A little over 36 years.

Q. I believe you touched on the effort you made to dispose of these shoes and said that you tried to get more than a dollar and the best you could get was a dollar? A. That's right.

Q. Did you offer the shoes to jobbers, more than one jobber? A. Yes, sir, I did.

Q. And the highest and best offer you could get was a dollar, is that right? A. Yes.

Mr. Tobin: That is objected to as not being binding on the creditors affected by this transfer.

The Court: One of the issues may be. What would be the value of the shoes?

I think it might have some bearing on that. Objection [10] overruled.

Q. (By Mr. Gendel): As the owner of those shoes did you consider that the reasonable value of the shoes was one dollar per pair when you sold them to Mr. Jubas?

A. Well being an owner I would think they would be worth more, but that is the best I could get, because the shoes were broken—pretty well broken in sizes. What the merchant would value

(Testimony of Gene Fagan.)

it and what a jobber or the public would value it is not the same, because if we put them on sale they didn't take to it, because we couldn't fit just every type foot that would come in.

Q. You couldn't sell it to the public, the only one you could sell it to was a jobber, and the most you could get was a dollar a pair, is that right?

A. That's right.

Q. Mr. Fagan, about what percentage, in value, money value, did those 1240 pairs of shoes bear to the remaining shoes you then had on hand?

A. Well, I couldn't say offhand. I imagine around fifteen, sixteen, seventeen, somewhere in there, per cent. I don't know just exactly.

Q. Didn't you state on one occasion before the referee that it was less than 10 per cent?

A. If I did, I don't recall. It has been quite a long time ago. I can't remember the exact words.

Q. Could it have been less than 10 per cent?

A. It could have been. It could have been more.

Q. But in the neighborhood of 10 per cent?

A. Yes.

Q. More or less? A. Somewhere in there.

Q. All right. Mr. Fagan, did you make any other job-lot sales after the sale of this merchandise to Mr. Jubas? A. I don't recall.

Q. Had you already ordered replacement merchandise?

A. Yes. That is the reason I sold those shoes was to replace them. Those were high heels. The style had changed. In the novelty business, if you

(Testimony of Gene Fagan.)

know anything about shoes, they change so fast, seasonable merchandise, and I had shoes coming to replace that by new shoes, which we went in a different set-up of what they call Cuban heels, lower heels, more substantial for the average type to walk in.

Q. Then this bulk sale, if we can call it that, to Mr. Jubas was not any part of a series of job lots where you were selling out all your merchandise, is that right? A. No, sir.

Q. All you were doing was clearing your obsolete stock to take on fresh merchandise, is that right?

A. That's right.

Q. Isn't it true that this obsolete stock had [12] accumulated——

A. Over a period of time.

Q. ——over a period of time? A. Yes.

Q. And you might have been able to salvage more from a jobber if you had sold them at the end of each season instead of waiting several seasons, isn't that right? A. That's right.

Q. In other words, they were pretty old by the time they got to Mr. Jubas for the sale of them, isn't that correct? A. Yes.

Mr. Gendel: That is all.

Redirect Examination

By Mr. Tobin:

Q. Isn't it a fact that at the time of this transaction with Mr. Jubas your stock totaled some-

(Testimony of Gene Fagan.)

where between eight and ten thousand dollars in value? A. Before selling?

Q. At the time of the sale to Jubas.

A. We had more stock than that.

Q. About how much did you have?

A. I wouldn't know in round figures. I know we had probably close to fifteen, eighteen thousand dollars. [13] We took that inventory, the value we paid for it as an inventory.

Q. You carried them on your inventory at the value for which you had agreed to pay?

A. What I paid for them.

Q. Is that right?

A. Which we paid for them.

Q. And they were sold to Jubas for about one-fifth or less of that inventory value?

A. If we had taken—yes. If we had taken the mark-down from season to season, these pairs that would accumulate—for instance, if you have 9½ triple A and it doesn't move, and you don't get a call for it, and that shoe is still carried in your stock, naturally the style changes on it, especially in novelty shoes, in high-heeled shoes. We paid good money during the war for that stuff, and the merchandise, a lot of it, was quite inferior.

Mr. Tobin: That is all.

Mr. Gendel: That is all, Mr. Fagan.

The Court: Mr. Clerk, we will interrupt to call the Gordon case.

(Other court matters.)

The Clerk: Sampsell v. Jubas.

Mr. Tobin: The plaintiff rests.

Mr. Gendel: Mr. Jubas, will you come forward, please? [14]

SIMON V. JUBAS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gendel:

Q. What is your name, please?

A. Simon V. Jubas.

Q. Spell that for the reporter.

A. J-u-b-a-s.

Q. Where do you reside?

A. 337 North Poinsettia Place.

Q. Is that Los Angeles? A. Los Angeles.

Q. You are the defendant in this action, are you?

A. Yes, sir.

Q. Mr. Jubas, how long have you been in the shoe business? A. Approximately 25 years.

Q. Has a good part of that been in the city of Los Angeles? A. Yes, sir, since 1927.

Q. Have you ever had any dealings with retail shoe stores during that time? A. Yes. [15]

Q. Describe your primary business over these years.

A. My business is buying close-outs, manufacturers' close-outs, wholesale close-outs, and retail close-outs of every type and description.

(Testimony of Simon V. Jubas.)

Q. When you referred to close-outs, are you referring to the same thing as job lots?

A. Yes, job lots.

Q. You say you have been doing that for about 25 years? A. Approximately, yes.

Q. Are you personally familiar with the usual practice and method of the retail shoe merchants in the County of Los Angeles in disposing of these job lots of shoes? A. Yes, I am.

Q. What does a job lot of shoes usually consist of?

A. A job lot of shoes could consist of the following: They could consist of men's shoes, ladies' shoes, children's shoes, slippers, shoes in general that a retail store would have or a wholesaler or manufacturer.

Q. Let's keep it now to a retail shoe merchant in the County of Los Angeles.

A. Did you want me to explain what the method of the business is from a jobbing standpoint in buying jobs?

Mr. Tobin: For the purpose of the record I would like to renew my objection to this line of testimony on account of [16] it being a different witness.

The Court: The objection may go to the entire line of questioning. The objection is overruled.

Q. (By Mr. Gendel): Describe what ordinarily goes into a job lot when you buy it from a retail shoe merchant.

(Testimony of Simon V. Jubas.)

A. A job lot—I don't know how to explain the question he asked me. The retailer would run a retail sale at the end of the season usually, a good merchant would take at the end of the season and close out his merchandise to a jobber.

Q. What does he close out to a jobber?

A. His broken-up lines, the lines of shoes that he wants to discontinue handling, the lines of shoes that don't move with him, the lines of shoes that he has exhausted in trying to dispose of them through the retail channels, and then as a last resort he sells them to a jobber or an outlet store.

Q. All right. In connection with any of these job-lot sales by retail shoe merchants in the County of Los Angeles, is it their regular and usual method and practice to sell these job lots without filing a notice, as we describe it, under Section 3440 of the Civil Code?

A. In the period of time that I have been in the job-lot buying I have never heard of a job lot being disposed of that they complied with the bulk law sales act. It is a [17] method that the shoe industry uses in disposing of the shoes. They try to get the best price for them and they sell them.

Q. And that sale is without any notice of sale under Section 3440, is that right?

A. That's right.

Q. All right. Tell us if you can now recall what was in the job lot of shoes that you bought on August 11, 1948, from Fashion Bootery.

(Testimony of Simon V. Jubas.)

A. They consisted of shoes that were purchased immediately after the war, a type of shoes that were very inferior; the retailer at that time, that is, immediately after war couldn't buy as many shoes or wherever he wanted to buy shoes, he had to buy wherever he could buy them, and as a result of that and as a result of the condition at the time, they had bad merchandise, inferior uppers, inferior soles, it was a question of not where you wanted to buy, it was a question of, rather, to obtain the merchandise, and as a result of that a great many merchants were naturally stuck with goods.

Q. Mr. Jubas, I am now asking you to describe as best you now recall the 1240 pairs of shoes you bought from Fashion Bootery.

A. Some of the shoes consisted of oxfords that had soles that you could—the soles were soles that were of a composition leather than you could write on the wall with them. [18]

Q. You mean the kind that left black marks on the floor?

A. Yes. Some of the shoes consisted of odd lots of shoes that the Fashion Bootery—that they, in turn, had bought jobs from jobbers. There were shoes that, as a natural accumulation of the broken sizes, and the styles, become obsolete. It was a general lot of shoes that he had no other avenue to dispose of them other than to try to sell them to a jobber or outlet store.

Q. Mr. Jubas, what did you do with the shoes after you got them?

(Testimony of Simon V. Jubas.)

A. When I got the shoes, it is our custom to take the shoes and straighten them out.

Q. What did you do with the shoes?

A. Took them to my place of business.

Q. Then what did you do with them?

A. I called—I would call in Mr. Aldrich from the Western Shoe Store and try to dispose of them to him. I offered the shoes to him for a dollar fifteen cents a pair. He told me at that time, why he saw these shoes—these shoes had the name on the boxes, "Fashion Bootery," he said, "You bought these shoes from the Fashion Bootery. They were offered to me at a dollar and a quarter a pair, I didn't want to have them at that time." And he passed them by and didn't want them. I called, I believe, the Beverly Bootery. [19] They were in to look at the shoes and they, in turn, advised me, because these shoes——

Q. Mr. Jubas, you tried to sell them, did you, in turn, to another jobber and outlet stores?

A. To retail outlet stores.

Q. And you were unsuccessful, is that right?

A. That's right.

Q. What did you do with the shoes?

A. The only avenue left to me was when I received better shoes, to try to work them in with these other shoes, a little here with one lot and a little with another lot, and tried to dispose of them.

Q. To the best of your present knowledge about how much did you net on these 1240 pairs of shoes for which you paid $1240?

(Testimony of Simon V. Jubas.)

A. It is pretty hard to answer that question. I can answer it in one way, and another way I can't answer it. By themselves it was very, very difficult for me even to get my money back. It was only through trying to work them in with other jobs that I bought. That way I could just give you a figure to the best of my ability.

Q. Give us your best estimate.

A. They probably would have averaged me a dollar and a quarter, about that.

Q. In other words, you feel that after you disposed of [20] the shoes in the method you have described to the court, that you got about a dollar and a quarter for each pair of shoes for which you had paid a dollar, as an overall average?

A. That's right.

Mr. Gendel: That is all.

Cross-Examination

By Mr. Tobin:

Q. Mr. Jubas, you are familiar with the bulk sales law of California? A. Yes.

Q. And you very frequently record bulk sales notices? A. Yes, sir.

Q. In connection with job lots? A. No.

Q. Under what circumstances do you publish and record the 7-day notice?

A. When I buy a stock, regardless of how small it may be, it may be a $150 stock, that is, the entire stock, I would comply with the bulk sales law. That

(Testimony of Simon V. Jubas.)

is when a man is going out of the business entirely. Or if I went in and bought the greater portion of his stock, or he was going out of business and selling me the men's shoes, I would comply with the bulk sales law act.

Q. In other words, you would record the notice if you [21] were buying the greater portion of the stock?

A. If I bought the entire stock, or if he was closing out the entire line, say, of men's shoes or children's shoes, or he was going out of the shoe business, and he would sell me because of my highest bid on the men's shoes.

Q. Let us assume that a man was in the shoe business and he was going to close out his men's shoes entirely, and retain his women's and children's shoes; if you bought the entire portion of the stock that consisted of men's shoes, you would record the notice?

A. If he was going out of business, yes.

Q. If he was discontinuing?

A. And if the stock ran 60, 70 per cent of their stock, the greater portion of their stock.

Q. You would record it? A. Yes, sir.

Mr. Tobin: That is all.

Mr. Gendel: That is all.

The Court: How did you happen to use the words "greater portion of the stock"?

The Witness: Your Honor, when I go into a store and see the man has got approximately stock

(Testimony of Simon V. Jubas.)

of $20,000, and I see that his stock would run $10,000 in shoes, or I would have a talk with him and he would tell me he is going out of the business, out of the shoe business—— [22]

The Court: But why do you make reference to the words "greater portion of the stock"? You say you would publish the notice in the event you were buying a greater portion of the man's stock, 50 or 60 per cent, but you wouldn't publish if it was, say, 30 per cent. Why do you attach any significance to the words "greater portion of the stock"?

The Witness: It all depends, your Honor, on the circumstances.

The Court: Do you think that the word "greater portion" are in that statute 3440?

The Witness: I would say that it is. If I walked in a man's store and he had $20,000 worth of merchandise, and he wanted to sell me $12,000 worth—in the first place, when you walk into a store, the owner would say to me "I have $10,000 worth of men's shoes, I want to dispose of it, I want 50, 60, 75 cents on a dollar," I would ask him, "How much does your entire stock amount to?"

The Court: Why would you ask him that?

The Witness: To determine as to how much he would want for the shoes. They would try to sell it to you on a percentagewise base. If I know the man is going out of the men's shoe business, then I would go through escrow with him. But when a

(Testimony of Simon V. Jubas.)

man wants to close out his odds and ends in short and broken lines, your Honor, then it is a different thing. [23]

The Court: You have read the statute, haven't you?

The Witness: Yes, sir.

The Court: The words "greater portion" don't appear in there. It says, "or a substantial part."

The Witness: If I may correct myself on it, your Honor. I feel this way: When a man is going to close out his entire line of a certain stock that he has, maybe the man's stock, he is going out of it entirely, he is discontinuing that line, I would go through escrow with him.

Mr. Gendel: I would say the witness is giving judicial construction in trying to define "substantial." I think that is the layman's definition of what he thinks "substantial" means, Judge.

The Court: No further questions.

Mr. Tobin: That is all.

Mr. Gendel: No questions.

Your Honor, I have here in the court room three retail merchants. I think two of the three saw the specific items and are familiar with the method and custom and practice of retail shoe stores, but it appears to me that there is no contest on it. I don't know whether it would be of assistance to the court or merely cumulative to call these witnesses.

The Court: There is a factual question and a legal question. There appears to be no dispute that it may have been the custom of retail merchants

to close out accumulation [24] of odd lines, and it may have been their practice to do it without complying with Section 3440. However, that raises a legal question whether a practice of merchants——

Mr. Gendel: If that factual situation is acceptable to the court, I don't think these gentlemen would add anything, and it would be our job from that point forward to attempt to convince your Honor as to whether or not this particular sale came under 3440.

Mr. Tobin: As far as we are concerned, if your Honor please, I don't feel that these witnesses could add anything as far as the value is concerned, because Mr. Jubas has testified he sold them for a dollar and a quarter a pair, and that would establish the value, or it would be practically conclusive on the value, because the bankrupt testified that he couldn't get over a dollar a pair for them. Jubas said he got a dollar and a quarter a pair for them. I think that would fix the value.

The Court: Do you want to enter into a stipulation as to what these witnesses would testify to, subject to your objection, Mr. Tobin?

Mr. Tobin: Yes, your Honor.

Mr. Gendel: May we stipulate that the three witnesses if called would qualify as expert retail shoe merchants in the City of Los Angeles, and that they would testify that in the regular method and practice of the conduct of their [25] business, that they close out job lots of obsolete and broken and old lines of shoes without any compliance with Section 3440 of the Civil Code?

Mr. Tobin: So stipulated.

The Court: So stipulated, subject to the objection made by the plaintiff as to the materiality of it.

The objection is overruled and the stipulation is accepted. The stipulation is accepted subject to the objection which counsel has made, and I will overrule the objection and admit it in evidence.

These men that would testify are in addition to those shown on Defendant's Exhibit A?

Mr. Gendel: Yes. I have some additional statements.

The Court: Do you want to offer Defendant's Exhibit A?

Mr. Gendel: Yes, I would. At this time the defendant offers as his next exhibit in order Defendant's Exhibit A, introduced for identification on December 9, 1949.

Mr. Tobin: That would be subject, of course, to our objection as to the materiality.

The Court: All right. Objection overruled.

The Clerk: Defendant's Exhibit A in evidence.

The Court: It will be admitted in evidence.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

The Court: Does that complete the case on the facts? [26]

Mr. Gendel: Defendant rests on the facts.

Mr. Tobin: No rebuttal.

The Court: Mr. Gendel, do you want to name the three witnesses?

Mr. Gendel: The ones here in the court room?

The Court: Yes.

Mr. Gendel: Mr. Aldrich, what is your first name?

Mr. Aldrich: Emil.

Mr. Gendel: Your name?

Mr. Warner: Mark Warner.

Mr. Gendel: I think Mr. Warner signed one of those statements, if I remember correctly.

And your name?

Mr. Prupis: Louis Prupis.

The Court: All right, counsel.

(Whereupon the case was argued to the court by counsel for the respective parties, which argument was reported by the court reporter but not transcribed at the request of counsel.)

The Court: Well, gentlemen, the statute in question, Section 3440, is of course a harsh statute; but, on the other hand, it has been put in the Civil Code of the State of California with a definite purpose in mind. It is for the purpose of advising creditors when some substantial part of the stock in trade is going to be sold. [27]

The statute says: "* * * the sale of a stock in trade, in bulk, or a substantial part thereof * * *."

In the Markwell case there was approximately six per cent of the stock involved, a little less than six. In Schainman v. Dean, as I figure it out, the court said 4,000 out of twenty or twenty-five thousand,

which would be either 16 or 17 per cent. In dollars and cents, according to the testimony, the amount of goods here transferred was 16 or 17 per cent. In percentage of quantity of goods, it was approximately 31 per cent. I am inclined to believe, and I so hold, that there was a sale of a substantial part of the stock in trade.

Now we come to "otherwise than in the ordinary course of trade." That phrase, I think, means ordinary course of trade of the bankrupt, which was that of a retail shoe merchant.

What the rest of it means is doubtful. Maybe they meant to use the word "or" instead of the word "and," and put in a catch-all for other irregularities in transactions. But it uses the words "and in the regular and usual practice and method of business of the vendor." It is true I admitted in evidence testimony of what some of these other merchants did. But at the very best it could be argued that you were proving a practice that they were ignoring Section 3440. You are proving that they were selling as retail [28] merchants substantial parts of their stock in trade without reference to Section 3440. Certainly you couldn't obviate the provisions of Section 3440 by merely showing that people disregarded it.

My decision is that the transfer was in violation of Section 3440.

It is a reluctant decision, because it is a harsh statute.

As to the amount of damages, the goods were

purchased by Mr. Jubas for a dollar a pair. He got more for them, but he has testified that he had to work them into other lines. They couldn't, apparently, be transferred in bulk again by him for any profit to him, and I assess the measure of damages as $1240.

Mr. Gendel: Will your Honor find that there was this method and practice that has been admitted in evidence?

Mr. Tobin: I don't think it is material.

The Court: I have taken the attitude that it is material. I do find, if it is of any value to you, that it was the practice of shoe merchants to sell blocks of their stock in trade in bulk, and it was their practice, also, to disregard Section 3440.

Mr. Gendel: Mr. Jubas may, because it sets a formula for other matters, decide to take an appeal on the thing, and I wanted to be sure that the finding would be clear on [29] that point.

The Court: I should have commented, also, that there is no question but what shoe merchants can carry on the practice of selling of their job lots, cleaning up their stock. The only thing is that they have to record a notice under 3440.

You probably weren't consulted in this case, counsel, before this was done, but I think the average lawyer if a client would come to him would have looked that section over and said, "Well, what does the section mean? The safe thing to do is to publish your notice of record and don't pay your money until you have recorded it."

Mr. Gendel: Judge, what has happened in this shoe industry is this, unfortunately: You have certain jobbers and outlet stores that travel up and down, for example, on the Coast, and the various merchants in the small communities that don't have access to people of that character expect these people coming along, they are competing with each other, and because of the practice and method that has developed over the years you don't have a situation where a merchant is willing to say to John Doe, the jobber, "All right, I will sell this job lot to you for a thousand dollars, but you can't pay me until" —as the statute now stands—"ten days from now," and the jobber himself is placed in the position where the notice goes out, we will say for argument's [30] sake—and that is, I think, one of the reasons they developed this practice over the years —and some other jobber comes in and wants to compete with him, and therefore you have a wrangle there which would result in more litigation for creditors and everyone concerned than the practice that they follow now, that when the items involved are items that accumulate in the ordinary course and are items that a good merchant would dispose of to get off his shelf, he does it in a job lot, he does it by means of making his bargain and concluding it.

It is not the type of business transaction which would ordinarily interest creditors, if it comes within the statute, in the sense that it is not an attempt, as in the Schainman case, to dispose of

all of his stock in job lots within a short period of time, pocket his money and walk away from his creditors. So that the practical aspects, I think, are the background of the method and practice that has been described to the court.

The Court: I am not commenting on all of that. I want to say that I find no wrongful conduct on the part of this defendant. But I do feel that one of the things involved here is that the jobber, seeing a chance to pick up what he thinks is a good buy—he wouldn't buy it unless he thought it was a good buy—probably doesn't record his notice because he may tip off some other buyer, and within the ten-day [31] period some other offer is made, and that may be one of the factors, and that may be what you mean by some of the confusion that may develop.

Mr. Gendel: You have a history here of dealings in this community way back as far as thirty, forty years.

The Court: I don't see any burden on Mr. Jubas to have gone down and recorded his notice. As a matter of fact, as far as protecting himself from other buyers, he could have made a contract that he would buy it at a dollar a pair, assuming that no creditor attached, and bind the seller not to sell anybody else at a higher price. All he had to do was to wait his ten days. There isn't any burden placed on merchants. You have got two practices. One is the practice of getting rid of some stock. Well, they can get rid of this stock,

but as I read the section if it is a substantial part of the stock in trade they are going to have to publish a notice. Now, the other practice that you attempt to prove is a practice that they disregarded Section 3440. Obviously from a legal standpoint the mere fact that people disregard a law does not change the law.

Mr. Gendel: There was no attempt, by showing what the parties do under these circumstances in the community, to show a disregard for the statute.

The Court: I don't mean it disrespectfully, but your showing did show that they didn't comply with Section 3440. [32]

Mr. Gendel: The point that I have in mind is this, and the reason that I think it is of importance: Let's assume for argument's sake that the practice of the shoe merchants was to sell in bulk—I mean to sell in job lots, and they did file these notices, making that part of their practice, whether it is required under 3440 or not, that is the way they did business, or for argument's sake, let's say their practice was to handle it through escrows, which aren't required by 3440, just to bring an analogy that will show what I have in mind. Now, if Mr. Jubas were to come along and surreptitiously buy the stock without opening an escrow, which is the practice in the community, just as we have a practice in Los Angeles of escrows on real property, we have a practice of using the title company, but in other states they don't use title companies, they use attorneys, that is the practice of the community,

attorneys go down to the County Recorder and they do their researching and give an opinion and abstract—that is the practice, I think, that the legislature had in mind in referring to the method and practice of the vendor, and in this instance I think we have shown that the community uses that method and practice and that the vendor used it. In other words, it isn't something which takes into consideration what is in a statute or what is not. It is a method of doing business, and I think that is what 3440 had in mind. [33]

The Court: I have made up my mind on it. You will be entitled to a finding as to that practice. Attorney for the plaintiff will prepare findings and judgment, unless they are waived.

Mr. Tobin: I will prepare findings.

Mr. Gendel: I will be out of the city probably from tonight——

The Court: Is ten days sufficient?

Mr. Tobin: Yes.

Mr. Gendel: I will possibly be out of the city from tonight until January 3rd.

The Court: Twenty days, then.

Mr. Tobin: As far as I am concerned, Mr. Gendel and I won't have any difficulty on the matter of technicalities.

Mr. Gendel: I didn't want the findings to get to your Honor without an opportunity to go over them.

Mr. Tobin: We are in the bankruptcy courts every day with and against each other, so we never have any difficulty.

The Court: I want to compliment both counsel. As I said, I did some independent research and I found all the things you found, but I didn't find anything else. And I want to tell Mr. Gendel that as far as the law is concerned I think those Circuit Court cases are kind of rough from your side of the case. The Markwell case particularly is persuasive.

Mr. Gendel: I think the Markwell case—this is what [34] I read from, your Honor; you might want to have it. The Markwell case I don't think really considered the substance of 3440 in the light of any serious examination, and although Judge Denman went off primarily on the question of whether a pledge was covered under 3440, I think the thing that induced him to do that was the obvious unfairness of the finding that the lower court was correct in holding it substantial.

It might not hurt for an appeal to be taken and reargue the thing in light of, you might say, "daylight of ordinary practice."

The Court: Court will stand adjourned. [35]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17th day of March, A. D. 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed Mar. 21, 1950 U.S.D.C.

[Endorsed]: Filed April 17, 1950 U.S.C.A.

[Endorsed]: No. 12524. United States Court of Appeals for the Ninth Circuit. S. V. Jubas, doing business under the fictitious firm name and style of West Coast Jobbing Company, Appellant, vs. Paul W. Sampsell, Trustee in Bankruptcy for the Estate of Fashion Bootery, a copartnership composed of Gene Fagan and Leo G. Olson, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 17, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 12524

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate of FASHION BOOTERY, a Co-partnership Composed of GENE FAGAN and LEO G. OLSON,

Appellee,

vs.

S. V. JUBAS, Doing Business Under the Fictitious Firm Name and Style of WEST COAST JOBBING COMPANY,

Appellant.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

Appellant, S. V. Jubas, doing business under the fictitious firm name and style of West Coast Jobbing Company, intends to rely on appeal on the following points:

1. The District Court erred in holding that the shoes sold by the bankrupt to the Appellant constituted a substantial part of the bankrupt's stock in trade.

2. The District Court erred in holding that the sale by the bankrupt to appellant was invalid under Section 3440 of the Civil Code of the State of California and Section 70(e) of the Bankruptcy Act

by reason of the failure to record and publish notice of intended sale.

3. The District Court erred in holding that the sale by the bankrupt to appellant was not in the ordinary course of trade or the usual course of business such as was engaged in by the bankrupt.

4. The District Court erred in awarding judgment to Appellee and against Appellant.

Dated: This 14th day of April, 1950.

GENDEL & RASKOFF,

By /s/ H. MILES RASKOFF,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 17, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD TO BE PRINTED

Appellant, S. V. Jubas, doing business under the fictitious firm name and style of West Coast Jobbing Company, does hereby designate the entire record, including all the papers, pleadings, evidence and exhibits certified to the Clerk of this Court by the Clerk of the District Court in connection with the within appeal, as material to the consideration of the appeal.

Appellant hereby requests that the entire record so certified, together with this designation and the statement of points upon which appellant intends to rely, be printed.

Dated: This 14th day of April, 1950.

GENDEL & RASKOFF,

By /s/ H. MILES RASKOFF,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 17, 1950.